

- (1) Whether claimant suffered accidental injury during the period June 1 through August 1, 1992;
- (2) Whether claimant's injury arose out of and in the course of her employment with respondent; and,
- (3) What is the nature and extent of claimant's injury and disability during the above dates alleged?

This case is a companion case to Docket No. 162,655 wherein the claimant, Rosemary Nguyen, alleged accidental injury arising out of and in the course of her employment with Tony's Pizza Service for injuries suffered to her right upper extremity in September 1991. As a result of that injury, claimant was awarded a fifteen percent (15%) permanent partial impairment to the right upper extremity. That award has not been appealed to the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

In this matter, claimant alleges injury during the period June 1 through August 1, 1992 to her bilateral upper extremities. During this period of time, claimant was being treated by Dr. Jeryl Fullen, an orthopedic surgeon, for problems associated with her right upper extremity. Dr. Fullen diagnosed primarily right wrist de Quervain's disease, recommended a course of treatment and assessed a functional impairment rating to the right upper extremity. The complaints to claimant's left upper extremity were extremely limited and Dr. Fullen assessed neither restrictions nor functional impairment rating to the left upper extremity.

Claimant was examined by Dr. Revis Lewis, a board-certified neurosurgeon, for an independent medical examination on June 16, 1993. Other than pain complaints, Dr. Lewis could elicit no objective findings to claimant's left upper extremity. He did diagnose possible tendinitis of the left wrist. Dr. Lewis assessed a ten percent (10%) functional impairment to the left hand, which converts to a five percent (5%) impairment of function to the whole body. Dr. Lewis indicated the diagnosis of tendinitis in the left wrist came from claimant's subjective complaints and from a history given to the doctor by the claimant's stepson, who acted as interpreter. Dr. Lewis opined that surgery was not indicated in this situation and provided no work restrictions to claimant for her left upper extremity problems.

Claimant was examined by Ronald Malm, D.O., a second-year resident in family practice in Salina, Kansas. At the time claimant was being examined by Dr. Malm, she had complaints of a rash and left wrist pain. He diagnosed possible de Quervain's and tendinitis of the left wrist and excused claimant from work indefinitely. He assessed no functional impairment to the claimant for her left upper extremity problems. His findings were based upon claimant's subjective complaints of pain and tenderness.

Claimant was also examined by Christian Hulett, M.D., a neurologist in Salina, Kansas. Dr. Hulett performed EMGs and nerve conduction studies, both of which were normal. He also did diagnostic tests looking for thoracic outlet on the right and did a multitude of tests wherein the right was compared to the left, with the left being considered

normal. All of his diagnoses were limited to the right upper extremity. He found nothing wrong with her left upper extremity.

K.S.A. 44-501(a) states in part:

“In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends.”

K.S.A. 44-508(g) defines burden of proof as follows:

“Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.”

Burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

The medical evidence in this matter is somewhat conflicting. Claimant's symptoms to her left upper extremity, supported by subjective complaints only, do not appear to support a finding of permanent functional impairment to claimant's left upper extremity during the period June 1 through August 1, 1992. The Appeals Board is not persuaded by a preponderance of the credible evidence that claimant suffered an injury arising out of and in the course of her employment during the dates alleged. The medical opinions of Dr. Fullen and of Dr. Hulett appear to be supported by the weight of the medical testing. Claimant's subjective complaints are not sufficient to overcome Dr. Fullen's opinion that claimant has suffered no permanent impairment as a result of injuries suffered while employed at Tony's Pizza Service during the period June 1 through August 1, 1992. The Appeals Board, in assessing the medical testimony, finds the testimony of both Dr. Fullen and Dr. Hulett to be credible and persuasive.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson, dated April 22, 1994, denying claimant any award in Docket No. 169,161, shall be, and hereby is, affirmed. This finding by the Appeals Board renders the remaining issues in this matter moot.

Fees necessary to defray the expense of the administration of the Workers Compensation Act are assessed against the respondent and its insurance carrier to be paid as directed in the April 22, 1994 Award of Administrative Law Judge George R. Robertson.

IT IS SO ORDERED.

Dated this ____ day of February, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Scott M. Price, Salina, KS
Mickey Mosier, Salina, KS
Jeffrey E. King, Salina, KS
George R. Robertson, Administrative Law Judge
George Gomez, Director